JIGARLAL KANTILAL DOSHI A

v.

AMANAH RAYA BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA B
ABDUL WAHAB PATAIL JCA
LIM YEE LAN JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEALS NO: J-02-965-05-2012 (NO 24),
J-02-7-01-2012 (NO 23), J-02(IM)-966-05-2012 (NO 25), C
J-02-967-05-2012 (NO 26), J-02(IM)-968-05-2012 (NO 27),
J-02-1064-05-2012 (NO 28), J-02-1065-05-2012 (NO 29),
J-02-1066-05-2012 (NO 30), J-02(IM)-1385-06-2012 (NO 31)
& J-02-584-1995
27 JUNE 2014 D

SUCCESSION: *Administration of estates - Grant of probate - Failure to apply for letters of administration first before obtaining grant of probate - Locus standi - Whether Amanah Raya Berhad had locus standi to continue trial proceedings on behalf of estate - Whether letter of* E *administration pendente lite could be granted with backward effect - Doctrine of relation back - Whether applicable to give party locus standi to actions commenced, undertaken or continued*

CIVIL PROCEDURE: *Locus standi - Proceedings - Administration of* F *estates - Failure to apply for letters of administration first before obtaining grant of probate - Whether probate wrongfully and unlawfully issued - Whether Amanah Raya Berhad had locus standi to continue trial proceedings on behalf of estate - Whether letter of administration pendente lite could be granted with backward effect - Doctrine of relation back -* G *Whether applicable to give party locus standi to actions commenced, undertaken or continued*

The appellant's father ('the deceased') had issued a certain amount of shares in the company he started, Overseas Industries Sdn Bhd ('the company') to the appellant before his death on H 1 July 1991. On 17 August 1991, the appellant's mother and one brother, Jogesh Kantilal Doshi ('Jogesh') as the named executrix and executor under the will, filed a civil suit ('Suit 195') against the appellant for, *inter alia*, a declaration that the appellant held the 1,475 shares in the said company in trust for the estate. On I 19 September 1994, the appellant filed a notice of motion to revoke the grant of probate to the executrix and the executor,

which was allowed by the High Court on 29 July 1995. The removal of the mother and Jogesh as executrix and executor, and appointment of Amanah Raya Berhad ('ARB') as administrator was affirmed by the Court of Appeal on 4 June 1998. Subsequently, ARB substituted itself as the plaintiff in Suit 195. On 29 December 2005, ARB initiated Petition 13, seeking relief under s. 181 of the Companies Act 1965. On 5 February 2008, the appellant filed an originating summons to revoke the appointment of ARB as the administrator of the estate. On 19 March 2008, the appellant filed summons in chambers (encl. 194) to strike out Suit 195 on the ground that ARB had no *locus standi* to maintain the suit as ARB had neither applied for nor extracted the grant of letters of administration to the estate. However, on 27 March 2008, ARB filed an affidavit that they had on 4 January 2008 extracted the grant of probate for the estate. On 24 June 2008, the appellant applied for an order that the grant of probate to ARB be set aside on the ground that the said probate was wrongfully and unlawfully issued. The grant of probate was the subject of an appeal in which the Federal Court held that ARB should have applied for letters of administration first before proceeding to obtain a grant of probate. Following the said decision, the appellant applied to strike out Suit 195 and Petition 13 on the grounds that without letters of administration granted to it, ARB had no authority to undertake the actions and steps in relation to Suit 195 or to initiate and proceed with Petition 13. On 2 December 2011, ARB through Petition 154, applied for and obtained *ex parte* the grant of letters of administration *pendente lite*. In the High Court, it was held that ARB had the *locus standi* to continue the trial on behalf of the estate of the appellant's father based on the letters of administration *pendente lite*. Hence, the appellant appealed. The issue was centred on the *locus standi* of ARB and the key part of the submissions for the appellant was that a letter of administration *pendente lite* could not be granted with backward effect, and its authority was limited to actions after the grant of it.

Held (allowing appeal)

Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) When a summons is issued, the person named as defendant must be competent at that time to answer the alleged wrongdoing and meet the remedy sought. If he is not competent, then the action is not maintainable. If he

subsequently obtains a grant of administration, that will not cure the fundamental defect and render the action maintainable. (para 21)

(2) In their appeal to the Federal Court where the appellant had succeeded, the Federal Court had made clear the distinction between an executor appointed under a will, and an administrator appointed by the court, and held that an administrator must first obtain letters of administration before obtaining a grant of probate. There was an oversight by ARB. (para 24)

(3) The matter herein was related to the rights of a family, and involved no third parties. The need to obtain letters of administration could not be lost upon an institution such as ARB. Creation of an exception without jurisprudential justification would only perpetuate inattention (*Jigarlal Kantilal Doshi v. Amanah Raya Berhad* [2011] 9 CLJ 361, refd). Further, the common law doctrine of relation back does not apply to give a party *locus standi* to actions commenced, undertaken or continued without it. Thus, this court allowed the appeal upon the issue of *locus standi* of ARB and set aside the orders of the High Court. (paras 19, 27 & 28)

Bahasa Malaysia *Translation Of Headnotes*

Bapa kepada perayu ('si mati') telah memberikan sejumlah saham dalam syarikat yang telah ditubuhkan olehnya, Overseas Industries Sdn Bhd ('syarikat') kepada perayu sebelum kematiannya pada 1 Julai 1991. Pada 17 Ogos 1991, ibu perayu dan salah seorang adik lelakinya, Jogesh Kantilal Doshi ('Jogesh') sebagai wali dan wasi estet si mati, telah memfailkan guaman sivil ('Guaman 195') terhadap perayu untuk, antara lain, satu pengisytiharan bahawa perayu memegang 1,475 saham dalam syarikat tersebut sebagai amanah bagi harta tersebut. Pada 19 September 1994, perayu telah memfailkan notis usul untuk membatalkan geran probet kepada wali dan wasi, yang telah dibenarkan oleh Mahkamah Tinggi pada 29 Julai 1995. Pembatalan ibu perayu dan Jogesh sebagai wali dan wasi, dan pelantikan Amanah Raya Berhad ('ARB') sebagai pentadbir telah disahkan oleh Mahkamah Rayuan pada 4 Jun 1998. Kemudiannya, ARB menggantikan dirinya sebagai plaintif dalam Guaman 195. Pada 29 Disember 2005, ARB memulakan Petisyen 13, memohon relif bawah s. 181 Akta

Syarikat 1965. Pada 5 Februari 2008, perayu memfailkan saman pemula untuk membatalkan pelantikan ARB sebagai pentadbir estet. Pada 19 Mac 2008, perayu memfailkan saman dalam kamar (lampiran 194) untuk membatalkan Guaman 195 atas alasan bahawa ARB tidak mempunyai *locus standi* untuk mengekalkan saman itu kerana ARB tidak memohon untuk ataupun mengekstrak geran surat kuasa mentadbir kepada estet. Walau bagaimanapun, pada 27 Mac 2008, ARB memfailkan afidavit bahawa pada 4 Januari 2008 ARB telah mengekstrak geran probet untuk estet. Pada 24 Jun 2008, perayu memohon untuk perintah bahawa geran probet kepada ARB diketepikan atas alasan bahawa geran probet tersebut telah dikeluarkan secara salah dan menyalahi undang-undang. Geran probet adalah subjek rayuan di mana Mahkamah Persekutuan telah memutuskan bahawa ARB sepatutnya memohon untuk surat kuasa mentadbir sebelum meneruskan mendapatkan geran probet. Mengikuti keputusan tersebut, perayu memohon untuk membatalkan Guaman 195 dan Petisyen 13 atas alasan bahawa tanpa pemberian surat kuasa mentadbir kepadanya, ARB tidak mempunyai kuasa untuk melakukan dan mengambil langkah-langkah berhubungan dengan Guaman 195 atau memulakan dan meneruskan prosiding Petisyen 13. Pada 2 Disember 2011, ARB melalui Petisyen 154, memohon dan memperolehi *ex parte* geran surat kuasa mentadbir *pendente lite*. Dalam Mahkamah Tinggi, diputuskan bahawa ARB mempunyai *locus standi* untuk meneruskan perbicaraan bagi pihak estet bapa perayu berdasarkan surat-surat kuasa mentadbir *pendente lite*. Oleh itu, perayu merayu. Isu yang timbul adalah berkenaan *locus standi* ARB dan bahagian utama bagi hujahan perayu adalah bahawa surat kuasa mentadbir *pendente lite* tidak boleh diberikan dengan kesan ke belakang, dan kuasanya terbatas kepada tindakan selepas pemberian itu.

Diputuskan (membenarkan rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Apabila saman dikeluarkan, pihak yang dinamakan sebagai defendan harus kompeten pada masa itu untuk menjawab dakwaan salah laku dan memenuhi remedi yang diminta. Jika dia tidak kompeten, maka tindakan tidak boleh dipertahankan. Jika dia kemudiannya memperolehi surat kuasa mentadbir, ia tidak akan memperbetulkan kecacatan asas dan menyebabkan tindakan dipertahankan.

(2) Dalam rayuan ke Mahkamah Persekutuan di mana perayu telah berjaya, Mahkamah Persekutuan telah membuat perbezaan yang jelas antara seorang wasi yang dilantik di bawah wasiat, dan pentadbir yang telah dilantik oleh mahkamah, dan memutuskan bahawa seorang pentadbir harus memperolehi surat kuasa mentadbir sebelum memperolehi geran probet. Ia adalah kesilapan yang dibuat oleh ARB.

(3) Perkara di sini adalah berhubungan dengan hak sebuah keluarga, dan tidak melibatkan pihak ketiga. Sebuah institusi seperti ARB tidak boleh menyangkal keperluan untuk memperolehi surat kuasa mentadbir. Penciptaan satu pengecualian tanpa justifikasi jurisprudential hanya akan mengekalkan kelalaian. (*Jigarlal Kantilal Doshi v. Amanah Raya Berhad* [2011] 9 CLJ 361, dirujuk). Juga, dokrin undang-undang am 'relation back' tidak boleh digunapakai untuk memberikan satu pihak *locus standi* ke atas tindakan yang dimulakan, diusahakan atau diteruskan tanpanya. Oleh itu, mahkamah ini membenarkan rayuan ke atas isu *locus standi* ARB dan mengenepikan perintah Mahkamah Tinggi.

Case(s) referred to:
Creed v. Creed [1913] 1 IR 48 ***(refd)***
Ingall v. Moran [1944] 1 KB 160 ***(refd)***
Jigarlal Kantilal Doshi v. Amanah Raya Bhd [2011] 9 CLJ 361 FC ***(refd)***
Padraig Gaffney v. James Faughnan [2005] IEHC 367 ***(refd)***
Roberts (FC) v. Gill & Co Solicitors and Others [2011] 1 AC 240 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Probate and Administration Act 1959, s. 19

Supreme Court Act 1981 [UK], s. 117

Other source(s) referred to:
Relation Back – To The Future: Conforming Iowa Rule of Civil Procedure 1.402(5) to Federal Rule of Civil Procedure 15(C), [2011] 60 Drake Law Review 263

For the appellant - Sri Ram (Murali Achan, Hargopal Singh, Ravenesan & Krishnan Nair with him); M/s S Ravenesan; M/s Thomas Philip; M/s Shearn Delamore & Co
For the respondent - Loh Siew Cheang (Gopal Sreenevasan & Mark Lau with him); M/s Sreenevasan Young; M/s Zaman & Assocs

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-195-1991]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Wahab Patail JCA:

Background

B **[1]** In 1966, the appellant Jigarlal Kantilal Doshi's father, one Kantilal Prabhulal Doshi ("the father"), who died on 1 July 1991, started a manufacturing business. The appellant began working for his father in the business at the age of 17 while his brothers, Tilaklal Kantilal Doshi and Jogesh Kantilal Doshi were sent
C overseas for studies.

[2] The business was incorporated as Overseas Industries Sdn. Bhd. on 31 December 1969 ("the company"). In 1970, the father caused to be issued 347 shares in the company to the appellant
D and 500 shares to the appellant's mother, Damayanti Kantilal Doshi ("the mother"). In 1973, the father caused a further 1,128 shares in the company to be transferred from the uncle who was holding it in trust for the appellant's father, to the appellant. In 1987, the father directed the mother's 500 shares to be
E transferred to himself. Three months before he died he made a will ("the will") as to the disposal of his estate ("the estate").

[3] On 17 August 1991, the mother and Jogesh Kantilal Doshi as the named executrix and executor under the will, appointed
F under the will, filed Civil Suit No. 22-195-1991 ("Suit 195") against the appellant for, *inter alia*, a declaration that the appellant holds the 1,475 shares in the said company in trust for the estate. On 15 October 1991, probate was granted in favour to the executrix and the executor. On 17 September 1994, the appellant
G filed a notice of motion to revoke the grant of probate to the executrix and the executor. The application was allowed by the High Court on 29 July 1995. That removal of the mother and Jogesh Kantilal Doshi as executrix and executor, and appointment of Amanah Raya Berhad as administrator was affirmed by the
H Court of Appeal on 4 June 1998.

[4] Only on 17 January 2001, nearly two and a half years after the affirmation by the Court of Appeal of the order of the High Court, Amanah Raya Berhad substituted itself as the plaintiff in Suit 195. Having been substituted as the plaintiff in Suit 195,
I Amanah Raya Berhad agreed to have Suit 195 and three other suits to be heard together. On 21 November 2005, Amanah Raya Berhad amended the writ and statement of claim in Suit 195.

[5] On 29 December 2005, Amanah Raya Berhad initiated petition 26-13-2005 ("Petition 13") seeking relief under s. 181 of the Companies Act 1965. Amanah Raya Berhad amended Petition 13 on 23 February 2006. Petition 13 prompted an application by the appellant to strike out Petition 13. On 28 February 2006, Amanah Raya Berhad agreed with the appellant that Petition 13 be heard together with the other related civil suits.

[6] On 5 February 2008, the appellant filed Originating Summons No. 24-384-2008 to revoke the appointment of Amanah Raya Berhad as administrator of the estate and a private trust company be appointed instead. On 19 March 2008, the appellant filed summons in chambers (encl. 194) to strike out Suit 195 on the ground that Amanah Raya Berhad had no *locus standi* to maintain the suit as Amanah Raya Berhad had neither applied for nor extracted the grant of letters of administration to the estate. On 27 March 2008, Amanah Raya Berhad filed an affidavit that they had on 4 January 2008 extracted the grant of probate for the estate. The appellant withdrew the applications.

[7] On 24 June 2008, the appellant filed Originating Summons No. 24-1970-2008 to apply for an order that the grant of probate dated 4 January 2008 to Amanah Raya Berhad be set aside on the ground that the said probate was wrongfully and unlawfully issued. The grant of probate was the subject of an appeal which failed in the Court of Appeal but on further appeal to the Federal Court, was allowed on 19 October 2011 on the ground that Amanah Raya Berhad should have applied for letters of administration first before proceeding to obtain a grant of probate. See *Jigarlal Kantilal Doshi v. Amanah Raya Bhd* [2011] 9 CLJ 361 FC.

[8] On 24 June 2008, the appellant filed Originating Summons No. 24-384-2008 for the revocation of the appointment of Amanah Raya Berhad as the administrator of his father's estate made on 29 July 1995 by the High Court when the appellant's application to remove the mother and Jogesh Kantilal Doshi as executors of the estate. The grounds relied upon was that the grant of probate dated 4 January 2008 to Amanah Raya Berhad be set aside as the said probate was wrongfully and unlawfully issued. The appellant's application was dismissed by the High Court, and upon appeal, was also dismissed by the Court of Appeal. The appellant successfully appealed to the Federal Court.

[9] Following the decision of the Federal Court, applications were filed on 3 November 2011 by the appellant to strike out Suit 195 and Petition 13 on the grounds that without letters of administration granted to it, Amanah Raya Berhad had no authority to undertake the actions and steps in relation to Suit 195 or to initiate and proceed with Petition 13 as described above.

[10] On 2 December 2011, Amanah Raya Berhad, through application 31-154-2011 ("Petition 154"), applied for and obtained *ex parte* the grant of letters of administration *pendente lite*.

At The High Court

[11] The grant of the letters of administration *pendente lite* was attacked on similar grounds. As stated by learned counsel for the appellant, the trial in the High Court centred on the *locus standi* of Amanah Raya Berhad and whether the shares held by the appellant were held in trust for the father.

[12] At the end of the trial, the High Court held, *inter alia*, that:

(a) Amanah Raya Berhad had *locus standi* to continue the trial on behalf of the estate of the father based on the letters of administration *pendente lite* granted on 16 December 2011; and

(b) The appellant held the shares on a resulting trust for the father's estate.

The Appeal Before This Court

[13] The issues pursued in this court in the written submissions similarly centred on the *locus standi* of Amanah Raya Berhad and the trust issue. The oral submissions focused upon the *locus standi* issue, primarily because if the appellant succeeds thereon, the second issue which concerns the merits of the consolidated trial becomes irrelevant as all actions and proceedings undertaken by Amanah Raya Berhad would be set aside.

Letters Of Administration Pendente Lite

[14] In its grounds of judgment of 10 February 2012 dealing with the grant of the petition for letters of administration *pendente lite*, the High Court summed up the parties' submissions as follows:

ARB's submission:

The petition was taken out by ARB pending the probate action for the purposes of continuing and completing the trial of the Consolidated Actions which were fixed for trial between 9.1.2012 to 13.1.2012. It is limited to the prosecution of the trial of the Consolidated Actions; it does not relate to the general administration of the estate. The Court is empowered under s. 19 of the Probate and Administration Act 1959 (Act 97) to issue letters of administration *pendente lite* to ensure that the estate of KP Doshi is managed and preserved for the benefit of those to be entitled thereto (*Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Steven & Sons, 1993); *Lily Iskandar & Anor v. Bonardy Leo & Ors* [1986] 1 MLJ 368). Given that the trial of the Consolidated Actions are fixed in January 2012, it must be in the interest of the beneficiaries of the estate that the trial proceeds so that the matter in dispute between the beneficiaries can be finally determined.

Jigarlal's submission:

Learned counsel accepted that ARB is still the administrator. However, he argued that ARB's appointment does not confer any status or *locus*. ARB's powers to act as the administrator is subject to getting a grant. The power under a grant is not retrospective. As such, even if a grant is issued, ARB did not have the *locus standi* to initiate Suit 195. Learned counsel also argued that the petition be dismissed or the Court make a limited grant forward and not backwards as the doctrine of relation back did not apply (*Ingall v. Moran* [1944] 1 KB 160).

[15] The key part of the submissions for the appellant is that a letter of administration *pendente lite* cannot be granted with backward effect, and its authority is limited to actions after the grant of it.

[16] The grant of letters of administration *pendente lite* is, in Malaysia, authorised by s. 19 of the Probate and Administration Act 1959 (Revised 1972) (Act 97) which provides as follows:

Pending any probate action, letters of administration may be granted to such person as the Court may appoint, limited so that the administrator shall not be empowered to distribute the estate, and shall be subject to such control by, and direction of, the Court, as the Court deems fit; and subject to that limitation the administrator so appointed shall have all the rights and powers of a general administrator.

[17] In the United Kingdom, letters of administration *pendente lite* are generally granted under s. 117 of the Supreme Court Act 1981 and are issued where there is a dispute as to the validity of a will or of a person's right to administer. Although subject to the immediate control of the court, an administrator *pendente lite* will usually have all the rights, duties and powers of an administrator. It does not differ from the powers granted to an administrator *pendente lite* under s. 19. That this power could be exercised to give the administrator *pendente lite* to take action after the appointment is not in question. The question is whether the doctrine of relation back applied to give a backdated effect, so as to enable the Amanah Raya Berhad to regularise or cure the actions of Amanah Raya Berhad before its appointment as administrator, and to continue or commence and maintain such actions without a grant of a letter of administration.

[18] The submissions for the appellant in this court on this issue began with the trite law laid down in *Ingall v. Moran* [1944] 1 KB 160 that an administrator cannot commence or continue or undertake any action on behalf of an estate prior to being granted letters of administration, and more importantly for the appellant, the following statement by Scott LJ, at p. 164:

> … As the writ was issued on September 17, 1942, and there was no grant till November, it follows necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator … Such an action was, in my opinion, incapable of conversion by amendment into a valid action – just as much so as if he had issued a personal writ claiming to be lawfully possessed of the estate of the deceased and had subsequently asked leave to amend by substituting a representative claim … The old writ was, in truth, incurably a nullity.

[19] In other words, the common law doctrine of relation back does not apply to give a party *locus standi* to actions commenced, undertaken or continued without it. A nullity cannot be cured.

[20] As we have noted above, the appellant was at pains in the High Court to limit any order made to future actions and not to past actions. The appellant submitted that the court makes a limited grant forward and not backwards as the doctrine of relation back as in *Ingall v. Moran (supra)* did not apply to the present case on the grounds that Amanah Raya Berhad's actions without a prior grant of a letter of administration were nullities.

[21] In *Padraig Gaffney v. James Faughnan* [2005] IEHC 367, Laffoy J, in striking out the proceedings, discussed *Ingall v. Moran (supra)* and *Creed v. Creed* [1913] 1 IR 48. The following extract explains *Ingall v. Moran (supra)* and the distinctions between appointments as an executor and as an administrator, and the grant of probate and the grant of letters of administration:

> There is no doubt that when he issued the plenary summons in this matter the plaintiff could not have maintained an action in relation to the matters he complains of in the statement of claim against the defendant. The defendant was not the administrator of the estate of the deceased and he was not answerable for the matters alleged by the plaintiff. But the defendant is now the personal representative of the Deceased, and the question which arises is whether this action can now be prosecuted by the plaintiff against the defendant in that capacity. The authorities suggest that it cannot.
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> In *Creed v. Creed* [1913] 1 IR 48, the plaintiff sought to amend the summons and the statement of claim to show that she was suing as administratrix with the will annexed of John Creed deceased. What had happened was that the plaintiff, believing that John Creed had died intestate, took out letters of administration intestate to his estate and commenced an action as such administrator against the defendant. The defendant, who had been aware that John Creed left a will appointing him executor, declared that fact for the first time in his defence. The plaintiff then took out administration with the will annexed, the defendant having renounced. It was held by Barton J that the summons should be dismissed, as the plaintiff's letters of administration were void *ab initio* and she had no title to sue when the action was brought. The judgment merely records the decision and it contains no analysis of the basis of the decision.
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> However, in *Ingall v. Moran* [1944] 1 KB 160, in which *Creed v. Creed* was cited in argument, the status of an administrator in the period before a grant is taken out and after the grant is taken out was analysed. The plaintiff in that case had issued a writ claiming to sue in a representative capacity as administrator of the estate of his son, who was killed in a motor accident, but he did not take out the letters of administration until nearly two months after the date of the writ. It was held by the Court of Appeal that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death could not be invoked so as to render the action competent. In his judgment, Luxmoore LJ

considered whether the doctrine of relation back, which is well established in respect of an administrator's title to a deceased's estate, has any application to the status of a plaintiff who can only sue in a representative capacity in an action started before the grant of letters of administration. He stated as follows at p. 167:

> It is, I think, well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognised by the rules of court by which the executor can prove the fact that he is the executor. ... An administrator is of course in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made, and that the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ.

Goddard LJ, in his judgment, considered a number of authorities cited in *Daniell's Chancery Practice*, 8th edn, p. 352, all of which were administration suits or suits relating to the administration of estates. He stated that the modern practice would be to issue a writ asking for the appointment of a receiver pending a grant of letters, and, if brought by a person who would be a beneficiary in the administration, there would be no objection to the action because the person entitled to take out letters is and must be made a defendant though the grant has not yet been made. In relation to the authorities he stated as follows at p. 172:

> The cases mentioned in *Daniell* are not an exception to this rule of law. They are cases in which letters were not necessary for a plaintiff to establish his title to sue or in which the absence of letters did not afford a defence to a defendant. Nor is it necessary to consider the many cases which show that once letters are granted the title of the administrator relates back to the death. They have no application to this question. All they show is that, once letters have been obtained, the title relates back so that the administrator may sue in respect of matters which have

> arisen between the date of the death and the date of the grant, just as he may sue in respect of a cause of action that had accrued to the intestate before his death, provided the cause of action survives.
>
> The court has not been referred to any authority in which, as here, it was the defendant who was a party in a representative capacity. However, in my view, the same principle must apply. When a summons is issued the person named as defendant must be competent at that time to answer the alleged wrongdoing and meet the remedy sought. If he is not the action is not maintainable. If he subsequently obtains a grant of administration, that will not cure the fundamental defect and render the action maintainable.
>
> In this case, the person named as defendant had no status as a representative of the deceased or of his estate when the plenary summons was issued. The action initiated by the issue of the plenary summons could not have been maintained and is still not maintainable. In the circumstances, it must be struck out. The court has unquestionable jurisdiction to strike out the proceedings under its inherent jurisdiction in accordance with the principles set out in *Barry v. Buckley* [1981] IR 306.

[22] More recently, Lord Collins, in the Supreme Court of the United Kingdom, in *Roberts (FC) v. Gill & Co Solicitors and Others* [2011] 1 AC 240, [2010] UKSC 22, had this to say of *Ingall v. Moran* (*supra*):

> 2. The principal questions on this appeal relate to whether this is an appropriate case for a representative (or derivative) claim, which was the focus of the judge's decision, and to the interpretation and application of section 35 of the Limitation Act 1980 and the rules of court which were enacted pursuant to it, first in the Rules of the Supreme Court, and now in the Civil Procedure Rules. The limitation issues were the main focus of the decision of the Court of Appeal. Section 35 was enacted following recommendations of the Law Reform Committee in 1977. It had two main objectives. The first was to enable a plaintiff to amend pleadings out of time so as to sue in another capacity, in particular to reverse the effect of such decisions as *Ingall v. Moran* [1944] KB 160, which created a grave injustice where proceedings were instituted under the Law Reform (Miscellaneous Provisions) Act 1934 prior to letters of administration being taken out and the limitation period expired before proceedings were instituted in a representative capacity: the grant did not date back to the date of death, by then it was too late to issue fresh proceedings or to amend. The second objective was to enable

A parties to be added out of time, in cases where joinder of the new party was necessary if the plaintiff's claim was to succeed, for example where the plaintiff was an equitable assignee and had omitted to join the assignor prior to the expiry of the limitation period.

B 3. But section 35 has been described as being "without doubt one of the most convoluted provisions in the entire law of limitations" (McGee, *Limitation Periods*, 5th ed 2006, para 23.003). That is no doubt why there have been more than 25 decisions of the Court of Appeal on section 35 and the rules of court.

C **[23]** The point we note, as made in *Roberts (FC) v. Gill & Co Solicitors and Others (supra)* is that to reverse the effect of the strict application of the rules of civil procedure in *Ingall v. Moran (supra)*, it was necessary to do so by amending the law. Similarly in the United States, in liberalising the rules of civil procedure, an D explicit recognition of the common law doctrine of relation back was incorporated into the rules: see "*Relation Back – To The Future: Conforming Iowa Rule of Civil Procedure 1.402(5) to Federal Rule of Civil Procedure 15(C)* [2011] 60 Drake Law Review 263.

E **[24]** In their appeal to the Federal Court where the appellant succeeded, the Federal Court made clear the distinction between an executor appointed under a will, and an administrator appointed by the court, and held that an administrator must first obtain letters of administration before obtaining a grant of probate:

F [12] The Court of Appeal had on 4 June 1998 appointed ARB as an administrator. The ARB should have applied for a grant of administration instead, and not as it did here for a grant of probate.

G **[25]** The Federal Court held:

[14] We are therefore unable to agree with the Court of Appeal in its finding that the grant was substantially a grant of letters of administration with will annexed since the respondent was named therein as a pentadbir or administrator. It should be recalled that H the ARB's initial appointment as an administrator by the High Court was pursuant to an application by the appellant to revoke the appointment of the then executrix and executor pursuant to s. 34 of the Probate and Administration Act 1959.

I **[26]** The Federal Court refused to hold the appointment of Amanah Raya Berhad as administrator was substantially a grant of letters of administration, and notwithstanding that the matter began in 1991, set aside the grant of probate.

[27] While to allow the appeal by the appellant would be inconvenient, and cause delay by setting the clock back, so to speak, substantially, that cannot be the determining consideration in the face of established authorities that the doctrine of relation back does not apply to nullities. The matter relates to the rights of a family, and involves no third parties. The need to obtain letters of administration cannot be lost upon an institution such as Amanah Raya Berhad. The need to obtain it was raised on 19 March 2008 and again on 24 June 2008. Creation of an exception without jurisprudential justification would only perpetuate inattention. This view is borne out by the decision of the Federal Court in the appeal involving the same parties and on similar considerations in *Jigarlal Kantilal Doshi v. Amanah Raya Bhd (supra)*.

[28] Though the thought that this dispute began over 20 years ago tended to persuade us to overlook the oversight by Amanah Raya Berhad so that the dispute be brought to an end quickly, the reasoning above, the weight of authorities and the fact that the dispute involves only members of the family of the deceased and no third parties and should be disposed of according to established law rather than convenience, inevitably leads us to our decision to allow the appeal upon the issue of *locus standi* of Amanah Raya Berhad, set aside the orders of the High Court with costs of RM5,000. Deposit is refunded. It is unnecessary to address the trust issue as the trial is, in the circumstances, an exercise in futility.